IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

CRL.A.No. 799 of 2004()

The judgment and Order of Acquittal dt.29-3-2003 in SC No.99 of 2001 passed by Addl.Sessions Judge, Thalasserry.

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APPELLANT: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

RESPONDENTS: ACCUSED:
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1. BALAN @ PARA BALAN, S/O. KUNHOOTTY,
KURIYATTU HOUSE, MOKERI AMSOM.

2. T. RAJEEVAN, S/O. KUNHIRAMAN,
THALASSEYIL HOUSE, MOKERI AMSOM.

3. PRADEEPAN @ KOTTAKKA KUNHAMBU,
KUNIYIL KALYATHAN HOUSE, MOKERI AMSOM.

4. SANEESH @ SANI, S/O. DASAN,
THARASSIYIL HOUSE, MOKERI AMSOM DESOM.

5. RAJIL @ BABU, S/O. VENDAN KUNHIRAMAN,
KUNHITHUNDIYIL HOUSE.

BY ADV. SRI.P.S.SREEDHARAN PILLAI
SRI.K.B.SAJEESH
SRI.P.GOPINATH
SRI.C.S.SUNIL
SRI.P.R.SREEJITH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/02/2007, ALONG WITH CRA NO. 1171 OF 2003 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR ,JJ

Crl.Appeal Nos.1171 OF 2003 & 799/2004

Dated this the 19th day of February 2007

JUDGMENT

Koshy.J

Seven accused faced trial for the brutal murder of one Krishnan Nair on the evening of 2-12-1999 motivated by political enmity. The trial court found that accused Nos. 1 and 4 are guilty for offences punishable under Section 302 of the I.P.C. Other accused were acquitted. The charges levelled against all the seven accused are the same. Charge sheet framed by the court reads as follows:-

> *On 2-12-1999 at or about 5.30 P.M you along with other accused persons being motivated due to political enmity bring members of an unlawful assembly in furtherance of the common object committed rioting and trespass into the house No.IX-543 belonging to one Krishnan Nair armed with deadly weapon like Koduval and voluntarily caused grievous hurt to said Krishnan Nair by inflicting cut injury with the dangerous weapon like Koduval as a result of which he died and thereby committed murder of Krishnan Nair and the offence punishable under Sections 143, 147, 148, 449 and 302 r/w Section 149 I.P.C*

2. PW1 a close neighbour who heard cries from the house of Krishnan Nair. He rushed to the house at or about 7.30 P.M on 2-12-1999 and saw Sri.Krishnan Nair was lying a in pool of blood. Later he was

taken by the police and admitted into the hospital and he died there. It is also stated that one Vijayan and two others accompanied him to the hospital.Ext.P1 is the F.I statement given by PW1 in the Panoor Police Station. In his deposition he stated that this Krishnan Nair was closely related to him. The Wife of Krishnan Nair (PW2) is his father's brother's daughter. He deposed that the incident occurred after 7 P.M. He heard cry from the house after 7 P.M and went into the house. There he saw the injured Krishnan Nair lying in a pool of blood. After sometime police took the injured to the hospital. He asked PW2 wife of the deceased who did this and she replied that it was done by two persons . It is stated as follows:-

രണ്ടുപേർ വീടിന്റെ അകത്തേക്ക ുകടന്നു രണ്ടുപേരുടെ കൈയിലും ഓരോ കൊടുവാൾ ഉണ്ടായിര ുന്നു അവരെ കണ്ടാൽ അറിയാം He also deposed that he got a telephonic information that the Krishnan Nair died at the hospital. According to him when he went to the house of the deceased, Krishnan Nair's wife (PW2)and her children PWs 3 & 4 were weeping and there was no light at that time. " ഉമ്മറത്തും അകത്തും ലൈറ്റ് ഉണ്ടായിരുന്നില്ല He also stated that he or the household members of the Krishnan Nair did not go to the hospital. He gave Ext.P1 on the early morning of next day (3-12-1999) at 8.30 A.M . According to him Krishnan Nair had no politics.'കൃഷ്ണൻ നായർക്ക് രാഷ്ട്രീയം ഇല്ല' He further stated that PW2 told him that the assailants were covered their face with black cloth, therefore she

was not able to understand the assailants.

പത്മാവതിഎന്നോട് പാഞ്ഞുവന്നുഅകത്തുവന്നുകൊത്തിയവർമുഖം മറയെ കറുത്തതുണി കൊണ്ട് മറച്ചിര ുന്നു എന്ന ു പറഞ്ഞിര ുന്നു അതുകൊണ്ട് ആണ് ആളെ മനസ്സിലാവാതെ വന്നത് എന്ന് പത്മാവതി പറഞ്ഞു. In the re-examination also he confirmed that Padmavathi has stated that the accused masked their faces.മുഖം മറച്ച ുവന്നു എന്ന് പത്മാവതി പറഞ്ഞു അതാണ് ശരി Then PW1 was declared hostile. But he struck on the above version. His version that there was no light in the house when he went and this also not challenged in the re-examination or in the cross-examination after he was declared hostile. Alleged motive of political rivalry was also not proved by the witness as he stated that deceased is not an active politician

3. PW2 is the the wife of the deceased. She deposed that her husband was a retired health inspector. When she along with her daughter Bindu (not examined) preparing tea in the kitchen her son Bino(not examined) said that two persons are coming to their house. She along with her daughter Bindu went towards the front door of the house. Two persons entered into their house having armed with Koduval According to her A1 has came first followed by A4. She also identified them in the court Then A4 threatened her and her daughter by lifting the Koduval and he went to the room where her husband was sitting. Seeing this they were frightened and ran towards the kitchen side and cried for

help. Meanwhile when her daughter tried to enter into her father's room A4 again threatened her .Seeing her father is in a dangerous situation they went outside and cried. When they returned she saw the above 2 persons were going away with Koduval. She identified MO1 as the weapon with A1 and MO2 as the weapon with A4. She saw that her husband was lying in a pool of blood. Later she fainted. She also stated that her husband was not a C.P.I(Marxist) activist, even though he was a sympathiser. She was questioned by the police only after 10 to 13 days after the incident. She stated very clearly that police did not ask her anything about the incident earlier and she was not in a fit state of mind. She also deposed in chief examination the police brought the accused and she identified A1 and A4. Even though she stated in cross-examination that police brought some people and from among them she identified A1 and A4. She did not mention about that in the previous statements. The son who saw the two persons in the beginning and her daughter who was stated to have been threatened by A4 twice were not examined as witnesses. Another person who was examined as PW3 was disbelieved by the court. Even though according to PW2 only 2 persons were involved in the incident PW3 included other 5 persons also. It only shows that prosecution wanted to include many political leaders of B.J.P as accused in the case.

4. PW 15 conducted initial investigation. He conducted the inquest and the report is marked as Ext.P2. He also went to the place of incident prepared scene mahazar and marked Ext.P3. He also recovered M.Os 1 to 11

from the place of incident.

5. PW 16 is the main investigating Officer. According to him on the basis of the confession made by A1 he went along with him to the place of incident where M.O1 was hidden. But no weapon was found out. Later M.O1 was recovered in Cr. No. 629/99 of Thaliparambu Police Station. He further stated that on the basis of the information given by A4, by Ext.P7 Mahazar. M.O2. was recovered from the nearby room of the kitchen of the house of A4 on 11-3-2000. According to him A4 has washed the Koduval and kept it for the ordinary use of the kitchen. It was not hidden in any place though it was kept in the private house. Even though MO4 recovered contained blood stains Ext.P24 Forensic Science Laboratory report shows that blood found was insufficient to show that it is human blood. Recovery was after 3 months of the incident. There was no authorship of concealment in the alleged confession statement. Both recoveries were not strictly admissible under Section 27 of the evidence Act. M.O 1 was one which was actually produced in another case it was not taken of by A1. In this case the identification of the deceased is not disputed. It is also not disputed that he was brutally murdered probably by weapons like M.O1 or M.O2. But the question is who is guilty. It is true that during the relevant time there were clashes between Marxist activists and B.J.P activists and on the day it is deposed by PW2 himself that BJP supporter was murdered on the same day. But according to PW1 deceased is not a party man and according to PW2 he is

only a supporter but not an active worker. If the actual assailants are not identified there is a chance to array some of political activists in the area as accused. In this case, PW1 is believed that the incident occurred at 7.30 P.M. If that be so, the incident would not have occurred at 5.30 P.M as mentioned in the charge sheet. Even going by the evidence of PW2 the incident occurred at the most about 6.45 P.M If that be so, PW1 ought to have heard the cries much before. Apart from the above PW1 was very categoric that she told him that she was not able to understand the accused as they were masked their faces with black clothes. It is true that according to Ext.P1 F.I. Statement,PW2 told PW1 that she can identify the accused. It is pertinent to note that no identification mark was also given by PW2. PW2 was questioned by the police only after 12 days. Even on that date the identification marks of the accused was not given by PW2 before the police also. She was not even able to say that they were having moustache During the cross-examination PW2 stated that she knew A4 earlier and A4 is the son of Mathu. But later she stated that she got acquainted with Mathu on the previous day of the incident only and she is not aware how many children he has got? വന്ന ആൾക്കാർക്ക ു മീശ ഉണ്ടായിരുന്നോ എന്ന് ഞാൻ ശ്രദ്ധിച്ചില്ല കൊട്ടക്ക മാത ുവിനെ അറിയാം അവരുടെ ആളെ (11th page begins) അറിയാം പേര് അറിയില്ല . ഇപ്പോൾ Police പറഞ്ഞശേഷം പേര് അറിയാം 4–ാം പ്രതി മാതുവിന്റെ മകൻ ആണ് എന്നറിയാം നിങ്ങൾ വന്നവരിൽ ഒരാൾ

മാതുവിന്റെ മകനാണ് എന്ന് പറഞ്ഞു വോ (Q) Ans. വന്നവർ വേറെ ആളെപ്പോലെ ഉള്ളവർ ആണെങ്കിലോ എന്ന് വിചാരിച്ചാണ് She also stated that she has noticed any specific identification marks on the weapon.കൊടുവാളുകൾക്ക് പ്രത്യേക അടയാളം note ചെയ്തിട്ടില്ല. കോടതിയിലെ room ൽ വച്ച് M.OI കാണിച്ചു.ഇതു തന്നെയല്ലേ എന്നു Police ചോദിച്ചു. താൻ അതെ എന്ന് പറഞ്ഞു M.OII എന്നോട് Police കാണിച്ചുതന്നു. ഇതാണോ എന്ന് ചോദിച്ചു. ഞാൻ അതെ എന്ന് പറഞ്ഞു PW2 has also stated that the accused and the weapons were shown to her by the police. Even though the accused (A1 & A4)and MO1 and MO2 were identified by her in the court since weapons of the accused were shown to her police station, the identification in the court became a mockery. It is true that merely because the deceased is the husband of PW2 her evidence cannot be rejected and in fact the related witnesses will be reluctant in giving false names, so that the real accused will escape. But at the same time if there were the accused were not identified the chance of naming the probable political rivals, is a possibility which cannot be ruled out. Her evidence has to be scrutinised carefully.PW2 in her cross-examination stated that there were seven persons along with the accused at the time when he saw the accused in the police station. But the Investigating Officer has no case that an identification parade was conducted for the purpose of investigation in the police station. The Investigating Officer did not say that other persons were brought and A1 and A4 were mixed up with

them, and that PW2 was asked to identify the real assailant in the police station. Even PW2 has stated immediately after A1 and A4 entered the room of the injured, they went out of fear. So she and her children would not have seen the incident Even she saw .2 persons allegedly A1 and A4 for a glimpse of the moment It would have been difficult for her to identify the accused. According to PW1 there was no light in the place of incident. Her son who allegedly saw them first and her daughter allegedly threatened by A4 were not examined. This is a case where police ought to have conducted proper identification parade as accused were strangers and PW2 did not give any identification marks It is true that when the incident happened in a house naturally it can be witnessed only by the household members and court cannot insist upon the independent evidence. But here the daughter and the son of the injured were there in the house. They ought to have been examined to corroborate the evidence of PW2 Even though a solitary eye-witness can be believed if it is trustworthy. Identification of the accused by PW2 is doubted. The delay in questioning of PW2 as well as other witnesses by the police is also a great concern for worry on the facts of this case. The five accused whose involvement were not mentioned by PW1 or PW2 were also included by prosecution by examining PW3 who is not believed at all shows that prosecution was popping up a case where actual culprits were not identified. If PW3 is believed the evidence of PW2 itself become doubtful as according to PW2 only 2 persons were involved in the incident. In any event at the maximum evidence of PW2

suspicion can be made against A1 and A4 and their identification is not proved beyond reasonable doubt. But suspicion however strong cannot replace conclusive proof.

6. Hence we are of the opinion that A1 and A4 are entitled to get the benefit of doubt and can be acquitted. Hence we acquit A1 and A4 (appellants in Crl.Appeal No.1171/2003) They should be released from prison forthwith if their presence is not required in any other case. Accordingly Crl.Appeal No.1171/2003 is allowed. No grounds are made out in Crl.Appeal No.799/2004 by the State for interfering in the order of acquittal of the other accused. Hence Crl.Appeal No.799/2004 is dismissed.

J.B.KOSHY, JUDGE

T.R.RAMACHANDRAN NAIR, JUDGE

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